Supreme Court of the United States

October Term, 1960

No. _____

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1960

No.

CIRCLE LINE SIGHTSEEING YACHTS, INC.,

Petitioner,

—against—

THE CITY OF NEW YORK,

Respondent.

In the Matter of the Petition of

CIRCLE LINE SIGHTSEEING YACHTS, INC., as Owner of the motor vessel SIGHTSEER VIII, in a cause of exoneration from or limitation of liability for damages arising out of a collision in the Harlem River on September 6, 1956, between said vessel and the Madison Avenue Bridge,

CIRCLE LINE SIGHTSEEING YACHTS, INC.,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Petitioner seeks certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, unanimously modifying three interlocutory decrees in admiralty by the United States District Court for the Southern District of New York (Dimock, J.). The District Court had held the City of New York solely liable for the damage

resulting when petitioner's sightseeing vessel collided with the City's Madison Avenue Bridge. The Court of Appeals found that the collision was caused by mutual fault, and directed division of damages.

The action was thereupon remanded to the District Court for hearing by its special commissioner, who is now in the process of assessing damages for report to the Court. Only the Circle-Line seeks review by this Court; no petition has been filed in connection with the libel brought by the administratrix of the vessel's captain, nor by any of the passenger claimants in the limitation proceeding.

In a petition for rehearing to the Court of Appeals, and in a supplemental petition seeking a rehearing *en banc*, petitioner raised, in substance, every point it now raises in this Court. The Court of Appeals unanimously denied both motions.

Statement

This is a negligence case. The issue throughout has simply been whether the accident was caused by the negligence of the bridge operator or the negligence of the vessel's captain. What petitioner has done in its instant brief is to seek to convert one of the *facts* indicating its captain's negligence—the total and disastrous absence of a lookout on the Sightseer VIII—into a cardinal point of procedural and substantive law, requiring resolution by the highest Court in the land.

Nothing in this case warrants such consideration. As in any negligence case, there were here a myriad of facts from which negligence was spelled out. The facts as to

the neglect of a lookout were clear and uncontested in the trial record—as petitioner was fully aware, for it joined the City in briefing the lookout question before the Court of Appeals at the greatest length, without the slightest objection to consideration of the issue, and without claiming surprise of any sort.

What petitioner is urging here (as it did, for the first time, in its petition below for a rehearing) is that, merely because the facts evidencing its violation of this particular criterion of negligence were not fully isolated in the opinion and findings of the trial court, the Court of Appeals could not choose to give them such emphasis as it deemed proper, in resolving the simple legal issue of negligence, which has *never* changed throughout this proceeding.

Moreover, not only does the pivotal issue of negligence thus turn on facts fully explored by both sides, but petitioner has conspicuously failed—either in its petition for rehearing to the Court of Appeals or in its instant petition to this Court—to point to any way whatever by which it hopes to rebut the Court of Appeals' findings as to its negligence; and indeed, as we shall see, petitioner cannot possibly produce such rebuttal evidence.

Corrected Statement of the "Questions Presented"

Accordingly, even assuming that the two decrees challenged are final orders subject to review by this Court, the true question here is confined to whether, in a negligence case, where the record amply supports the finding of the Court of Appeals, the correctness of that factual finding presents a question which should be entertained by this Court. To so hold, this Court would have to ignore

its settled practice of refusing to grant certiorari to consider the specific facts of a case, and to do so, moreover, in a case of no important public interest or legal significance whatever.

Facts

The Court of Appeals found that this accident occurred when petitioner's vessel, the Sightseer VIII, attempted to go underneath the City's drawbridge, despite the fact that preparations were obviously being made to open for a tug on the other side of, and much closer to, the bridge; the bridge did in fact open, the Sightseer's captain observed the opening too late to stop, and his ship collided with projections underhanging the half-open bridge.

The Court concluded that the City had been at fault in failing to devise an effective means of warning ships like the Sightseer—which were low enough to pass under the bridge without an opening and which might decide to ignore the preparations for opening—that an opening was in fact about to begin. It further found, however, that the Sightseer's captain (who had assumed that the bridge operator, despite the preparations for opening for the other ship, would not in fact open until after the Sightseer had passed through) was negligent in failing to maintain a proper lookout; such a lookout, the Court pointed out, at the very least quite possibly might have seen the opening bridge in time to avoid or lessen the accident.

The minutes of the trial before the District Court (contained in the transcript of the record subpoenaed to this Court by the City) establish—not simply, be it emphasized, a failure by petitioner to show the presence of a lookout—

but affirmative and uncontested admissions, by every single member of the crew, that nobody whatever, except the captain, was looking or listening to the tug, the river, or the bridge, or was even aware of any need to do so. In its brief below, the City pointed to:

(a) The specific testimony of the mate that he "wasn't looking up the river" (Tr. 62-66); of one deckhand that he was looking at the passengers, and never at the bridge (Tr. 152-4, 160-4); of the second deckhand that he was below deck (Tr. 74-6), as were the chief engineer and the concessionaire (Tr. 78); and of the third deckhand that he was not looking, and saw nothing whatever, until after the captain did (Tr. 82-3, 90-93).

(b) The established admiralty rule that a vessel of this size required a lookout with no other duty [*Griffin*, Collision, § 109; *Chamberlain* v. *Ward*, 62 U. S. (21 How.) 548, 570; *The Colorado*, 91 U. S. 692, 698], and that the absence of such a lookout was equivalent to a statutory fault [*The Madison*, 250 Fed. 850, 852 (C. A. 2d, 1918); *Merritt-Chapman and Scott Corp.* v. *Cornell S.S. Co.*, 265 F. (2d) 537, 539 (C. A. 2d, 1959)].

(c) The uncontested record evidence of a long list of signals and observations missed by the captain, in his single-minded attempt to pass under the bridge before it opened for the tug; and the further evidence that the opening began a full minute before the collision, and that a proper lookout would have detected it long before the captain did, in ample time to stop the ship prior to the collision.

In its answering brief, petitioner did *not* deny—or even mention—a single one of the above points. Nor, it should

be most heavily stressed, did it complain for one moment that the lookout issue had not been raised below, had been less than fully explored at the trial, or came as any surprise to it whatever. Petitioner argued *solely* that a lookout would not have helped avoid the accident.

The Court of Appeals found that there was substantial evidence that a lookout might have seen the opening bridge earlier, and that certainly petitioner had not carried its burden, under the rule of *The Pennsylvania*, 86 U. S. (19 Wall.) 125 (1873), of establishing that the absence of a lookout could not have contributed to the accident.

We note that even in its instant brief, petitioner does not seriously attempt to deny that the Sightseer totally lacked an independent lookout. We can hardly blame petitioner, in view of the trial record. In addition to the citations already given, the Court will note the following references, in the course of the trial, to the presence, adequacy and need for a lookout (on questioning, be it observed, by the attorneys for both petitioner and the City)—Tr. 36, 39, 43, 44, 87-90, 188, 297-8, 331.

Petitioner's position comes down, in essence, to the claim that it must have a second opportunity to establish that the absence of a lookout could not have, under any circumstances, contributed to the accident; and that, unless it obtains that, this Court's decisions in *McAllister v. United States*, 348 U. S. 19 (1954) and *The Pennsylvania*, 86 U. S. (19 Wall.) 125 (1873), will somehow be violated. There is not the slightest merit to any of this, let alone such merit as to raise a substantial question for this Court.

ARGUMENT

The Total Irrelevance of the *McAllister* Case.

Petitioner devotes Point I of its brief entirely to an intricate theory, allegedly deduced from the "clearly erroneous" rule set forth in *McAllister* v. *United States*, 348 U. S. 19 (1954). Apart from everything else, we established in our brief below—and petitioner made not the slightest rebuttal—that the "clearly erroneous" rule was not applicable to this case.

First of all, the vast bulk of petitioner's evidence—including *all* its eyewitness evidence—consisted of testimony given before the Coast Guard a few days after the accident, by witnesses no longer available at the time of trial—whereas all of the City's evidence was by live witnesses, very much available for extensive and grueling cross-examination. Accordingly, the Court of Appeals was in at least as good a position as the District Court to examine the evidence afresh—and, moreover, was free from the inevitable distortion that the unbalanced situation as to witnesses must have imposed on the District Court.

The cases are unanimous that the "clearly erroneous" rule is not applicable where the bulk of crucial testimony in the trial court is in written form. See *Mottaghi* v. *Barkey Importing Co.*, 244 F. (2d) 238, 248 (C. A. 2d, 1957), cert. den. 354 U. S. 939 (1957); *Diamond State Tel. Co.* v. *Atlantic Refining Co.*, 205 F. (2d) 402, 408-9 (C. A. 3d, 1953); *Panama Transport Co.* v. *The Maravi*, 165 F. (2d) 719 (C. A. 2d, 1948).

Furthermore, even were this not so, it is well-settled that the Court of Appeals can review the decision below *de novo*

where, as here, the vital question was the standard of due care to be imposed on the Sightseer's captain and on the bridge operator. The ultimate determination of negligence, in other words, is a question of law, to which the "clearly erroneous" rule is not applicable. *Great A. & P. Co.* v. *Lloyd Brasileiro*, 159 F. (2d) 661, 665 (C. A. 2d, 1947), cert. den. 331 U. S. 836 (1947); *Verbeeck* v. *Black Diamond S. S. Corp.*, 269 F. (2d) 68, 70 (C. A. 2d, 1959).

All of this being true, we see no reason to discuss petitioner's theory spun from the "clearly erroneous" rule—a theory which is actually just another way of stating its contention that the Court of Appeals was limited to reviewing only those criteria of negligence isolated by the District Court, and was required to blind itself to all the rest of the record proof thereon. To that remarkable contention we now turn.

The Finding of the Court of Appeals That Petitioner Was Negligent Was Wholly Supported by the Record; Nor Should This Court Be Burdened By Being Asked to Look Into Any Such Question.

We believe that we have established the ample record support for the Court of Appeals' finding that the Sightseer possessed no independent lookout of any sort, and that such a lookout might well have prevented or mitigated this accident. Even the "clearly erroneous" rule, had it been applicable, would have been fully met by this record. In any event, the correctness of the Court of Appeals' findings surely do not present a question requiring review by this Court.

Petitioner's attempt to avoid the obvious lack of any substantial question in this connection, by insisting on the

Court of Appeals' powerlessness to consider the lookout aspect of the Sightseer's negligence, solely because the trial judge did not isolate that aspect in his opinion and findings, is patently a desperate last resort. As we have seen, this complaint was thoroughly scrutinized by the Court of Appeals, on the petition for rehearing, and was peremptorily rejected.

Nor has petitioner been able to discover any other judicial acceptance for its contention. Each of the cases it cites (pp. 6-7 of its petition) involves a situation in which the appellant sought to change the entire nature of the case on the appeal—*e.g.*, from an action on a contract to one in *quantum meruit* [*Weiss* v. *Duro Chrome Corp.*, 207 F. (2d) 298, 300 (C. A. 8th, 1953)], or from a suit for cancellation of a contract to one for reformation [*Brown* v. *Rudberg*, 171 F. (2d) 831 (App. D. C., 1948)]. None of this bears in the slightest on the right of the Court of Appeals to cull from the trial record those aspects of petitioner's negligence which it deemed dispositive. Nor is there anything in its choice of the facts to be emphasized which can bring this case in any way within the already overburdened jurisdiction of this Court.

In an effort to distract the Court from this patent lack of any question worthy of its notice, petitioner has suddenly discovered an alleged conflict with the rule of *The Pennsylvania*. We are somewhat vague as to just how that conflict is supposed to arise; in net effect, however, petitioner insists on a second chance to carry the burden imposed by that Rule.

Under the Rule, petitioner would have to establish that a lookout could not possibly have helped avoid the accident. Let us see what this means. There is no question

that the bridge started opening before the captain saw it opening, and the Court of Appeals so found; indeed, petitioner expressly admitted, in its brief below (p. 23), that "Quite possibly, there was a lapse of some time . . ." between the opening and the captain's observation thereof.

This means that, in order to carry the *Pennsylvania* burden, petitioner would have to establish this at the very least: that an independent lookout who could, unlike the captain, concentrate entirely on being a lookout—whose whole task was to watch for danger—could not possibly have seen the opening when it began, or at any point earlier than the one at which the captain finally awoke.

Impossible as such a burden would be to carry in ordinary circumstances, the facts here are such as to render petitioner's raising of the issue incomprehensible. For petitioner's own evidence in the District Court consisted almost entirely, as we have seen, of the four-year old depositions before the Coast Guard. Since the Sightseer's captain and its mate were both dead before the trial, and no one else, concededly, was taking the slightest interest in the bridge or the river, petitioner is obviously in no position to produce any additional evidence whatever. It cannot possibly carry the *Pennsylvania* burden of establishing that the absence of a lookout "could not have been" a contributing cause of the accident.

Far from rebutting any of this, the petition herein proves our point. For nowhere in the course thereof does petitioner suggest a single example of any additional evidence it could produce at a second trial. Not one fact is even hinted at, as to either the adequacy of the lookout or the need therefor, that is not already a part of the record.

In other words, petitioner demands a new trial to answer a contention it was totally unable to answer in the Court of Appeals, to which it has produced no answer in this Court, and to which, on any view of its witnesses and the conceded facts, it cannot possibly present an answer of any sort.

In short, when this case is boiled down to its true proportions, it becomes a routine instance of a petitioner asking review by this Court, where the only question presented is one of fact. This Court has repeatedly held that it will not review evidence to pass on the correctness of findings of fact. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 178 (1938); *National Labor Relations Board v. Waterman S.S. Corp.*, 309 U. S. 206, 208 (1940). In this case particularly, where there was more than ample record support for the Court of Appeals' resolution of the issue of negligence, there is not the slightest public interest or significance warranting Supreme Court review.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the Court of Appeals should be denied.

March 31, 1961.

Respectfully submitted,

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